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LAI MENG

v.

TOH CHEW LIAN

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HIGH COURT MALAYA, KUALA LUMPUR
YEOH WEE SIAM J
[ORIGINATING SUMMONS NO: 24-111-2011]
30 SEPTEMBER 2011

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FAMILY LAW: *Children - Legitimacy - Application for access to illegitimate child - Whether application made pursuant to Guardianship of Infants Act 1961 - Whether O. 84 of Rules of the High Court 1980 applicable - Whether child made ward of court*

D

FAMILY LAW: *Children - Legitimacy - Whether putative father had right of access to illegitimate child - Whether mother of illegitimate child had right to deny access to putative father - Whether court had to give in to wishes of mother and welfare and best interests of child - Whether putative father could be granted access in exceptional cases*

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The plaintiff and the defendant who were each married to their own spouses had an affair which produced an illegitimate child ('the child'). When the relationship turned sour about four years after it began, the parties signed a settlement agreement under which the plaintiff agreed to pay the defendant a substantial sum over a period of five years. The child stayed with the defendant who divorced her husband a year after her affair with the plaintiff began. The plaintiff visited the child daily, except on Sundays, from the time she was born. However, once the payments under the settlement agreement were fully settled the defendant denied the plaintiff access to the child. The plaintiff claimed the defendant wanted him to continue paying her RM15,000 monthly but he refused to do so although from the time the child was a year old he had been paying the defendant RM3,000 monthly towards the child's maintenance. He had also made the child a 50% beneficiary of his EPF funds. The plaintiff filed the instant application for an order that he be granted access to the child on the occasions and times set out therein. The defendant opposed the application on the ground she had full legal rights over the child and wanted to raise her without interference or influence from the plaintiff. She said she was against granting him access in the interests of the child's security and welfare as she did not approve of the type of friends the plaintiff kept and the fact he drank alcohol, smoked and was abusive. The defendant also opposed the application on the technical grounds that (i) the application was not maintainable under O. 84 of the Rules of the High Court 1980 ('RHC') as it was not made pursuant to the Guardianship of Infants Act 1961 ('GIA') nor was

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the child a ward of the court and (ii) the court had no jurisdiction under s. 24(d) of the Courts of Judicature Act 1964 ('CJA') to grant a putative father access to an illegitimate child as that section made no mention of the word "access". A

Held (dismissing the application with costs): B

(1) If the court considered the defendant's wishes, the plaintiff could not be granted access to the child at all. The defendant had full legal rights to the child and the putative father had no legal rights or say in the matter. If the defendant wanted a clean break from the plaintiff and wished to raise the child on her own, that wish had to be respected, considering the plaintiff had never thought it fit to marry the defendant but merely kept her as his mistress. (para 61) C

(2) It was not in the child's best interests for the plaintiff to be granted access to her on a regular basis considering the acrimonious relationship between the plaintiff and the defendant. The plaintiff had not made any offer to marry the defendant and to legitimise the child. It was through his affair with the defendant that the child was rendered illegitimate. It was best the defendant be allowed to move on with her life with the child and without the plaintiff. There was no evidence the defendant was morally unfit, or unfit in other ways, to have sole custody, care and control of the child. (para 90) D E

(3) Only in exceptional cases should a putative father be given the privilege of access to an illegitimate child. Each case has to be decided on its own merits. Based on strong public policy considerations, it was improper for the court to make a blanket ruling that a putative father must necessarily be given rights of access to an illegitimate child. (paras 75 & 79) F

(4) The court agreed with the defendant's objection that the plaintiff's application under O. 84 of the RHC was wrong as the application did not say it was made under the Guardianship of Infants Act 1961 and neither was the child a ward of the court. (paras 18-20) G

(5) The wording in s. 24(d) of the CJA was wide enough to grant the court power to decide on access. The first part of s. 24(d) gave the court, among other things, power to decide on guardianship of infants, whether legitimate or illegitimate, while the second part of s. 24(d) gave the court power to decide general matters over the infant, whether legitimate or illegitimate, including access. (para 29) H

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Case(s) referred to:
Chelsa Cabalona Abdullah v. Siek Ming Hua [2008] 8 CLJ 285 HC ***(refd)***
George Pathmanathan Michael Gandhi Nathan v. Ong Eu May [2011] 1 LNS 419 HC ***(dist)***
Karupayee Paramasua v. Ravisanthiran P Marimuthu [2011] 1 LNS 650 HC ***(dist)***
Khor Liang Keow lwn. Tee Ming Kook [1996] 2 CLJ 631 HC ***(refd)***
Komalatah Gunasekaran lwn. Nagappan Ramasamy [2006] 4 CLJ 563 HC ***(refd)***
Leong Sam Moy v. Low Chee Thiam [1997] 2 CLJ Supp 212 HC ***(refd)***
Lim Suk Fang (F) v. Lim Kim Heng [1993] 1 LNS 35 HC ***(refd)***
Low Pak Houng v. Tan Kok Keong [1998] 1 CLJ Supp 357 HC ***(refd)***
Re Adoption Application No: 41/61 [1962] 2 All ER ***(refd)***
Re Balasingam & Paravathy, Infants; Kannamah v. Palani [1970] 1 LNS 134 HC ***(refd)***
Ruari Dharmuid Hann v. Tee Peggi (Shah Alam High Court OS No. MT3-24-2393-2006) (Unreported) ***(refd)***
Sean O'Casey Patterson v. Chan Hoong Poh & Ors [2011] 3 CLJ 722 FC ***(refd)***
Sinnakaruppi Periakaruppan v. Bathumalai Krishnan [2001] 2 CLJ 435 HC ***(refd)***
T v. O [1992] 3 CLJ 1756; [1992] 3 CLJ (Rep) 633 HC ***(refd)***
Tang Kong Meng v. Zainon Md Zain & Anor [1995] 4 CLJ 409 HC ***(refd)***
Yap Lee See v. William Tay & Ors [2011] 1 CLJ 793 HC ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 27
Courts of Judicature Act 1964, s. 24(d)
Guardianship of Infants Act 1961, ss. 1(3)(a), 5, 19A, B
Law Reform (Marriage and Divorce) Act 1976, s. 75
Rules of the High Court 1980, O. 84 r. 1, O. 92 r. 4

Other source(s) referred to:
Bromley's Family Law, 8th edn, para. 548 of Halsbury's Laws of England, vol 24

For the plaintiff - Liza Chan; M/s Liza Chan & Co
For the defendant - Patricia Chan (Jayanthi with her); M/s Lee Ros & Ling

Reported by Ashok Kumar

JUDGMENT

Yeoh Wee Siam J:

Enclosure 1

[1] The plaintiff's prayers in encl. 1 are:

(a) The plaintiff be granted access to the illegitimate child, Angelina Lai Wei Ling ("the child"), two years old, according to the following terms:

(i) Every Monday, Tuesday and Thursday from 6pm to 10pm;

(ii) Alternate weekends from 10am Saturday to 10pm Sunday;

(iii) Christmas day in alternate years from 5pm on Christmas eve to Christmas day 5pm;

(iv) Chinese New Year ("CNY") in alternate years from 5pm on the eve of CNY to 5pm on the 4th day of CNY;

(v) The child's birthday in alternate years from 5pm on the day before the birthday until 5pm of the birthday;

(vi) Additional access to the child to be fixed through the telephone with the defendant on any day from 9am to 9pm.

(b) The defendant, her servants or agents or otherwise be restrained from removing or attempting to remove the child out of the jurisdiction of the High Court of Malaya;

(c) Costs of this application;

(d) Other relief as deemed fit by the court.

Background Facts

[2] The plaintiff (now 56 years old) and the defendant (now 45 years old) were respectively married to their own spouses. The plaintiff has two sons of ages 25 years old and 19 years old, whilst the defendant has two children of ages between 15 to 20 years old.

[3] The plaintiff and defendant met each other in 2002 and started their intimate relationship. In 2003 the defendant divorced her husband.

[4] On 28 August 2004, the first separation agreement was signed between the plaintiff and the defendant (exh. LM-3) where the plaintiff agreed to pay the defendant RM800,000 by instalments. However, this agreement was not enforced since both parties carried on with their relationship.

[5] The relationship later turned sour.

[6] On 17 May 2006 the plaintiff and the defendant signed a settlement agreement where the plaintiff agreed to pay the defendant RM1.4 million, the first instalment being RM200,000 and the balance in 56 instalments of RM15,000 with the last instalment being in January 2011.

[7] On 28 April 2009 the illegitimate child was born.

[8] From May 2010 to the present, the plaintiff has been paying RM3,000 per month for the child (exh. LM7).

[9] On 9 July 2010 the plaintiff made the child a 50% beneficiary of his EPF account whilst his two legitimate sons shared the balance of 50% (exh. LM8).

[10] The plaintiff had been seeing the child everyday, except on Sundays, from the time the child was born. However, in February 2011, the plaintiff was denied access to the child by the defendant.

[11] On 28 April 2011 the plaintiff gatecrashed into the child's birthday party to see the child.

[12] On 25 July 2011 the plaintiff filed this Originating Summons ("the OS") for access to the child.

[13] On 5 August 2011 this court made an order under prayer (a)(i) of the OS for interim access for the plaintiff to see the child on every Monday, Tuesday and Thursday, from 6pm to 8pm (and not from 6pm to 10pm as prayed for).

[14] The court heard the OS on 14 September 2011.

Issues

[15] This OS was filed under s. 24(d) of the Courts of Judicature Act 1964 ("the CJA"), O. 84 of the Rules of the High Court 1980 ("the RHC"), s. 27 of the Civil Law Act 1956 ("the CLA") and "In the matter within the jurisdiction of the High Court" (see intitulement of this OS).

[16] The issues are:

(a) whether this application was filed by the proper mode under O. 84 of the RHC;

(b) whether this court has the jurisdiction to grant access to a putative father to an illegitimate child; and

(c) whether access should be granted in this case.

Correct Mode For Commencement Of This Application A

[17] Order 84 r. 1 of the RHC provides as follows:

> Applications under Guardianship of Infants Act (O. 84 r. 1).
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> 1. Where there is pending any action or other proceeding by reason of which an infant is a ward of court, any application under the Guardianship of Infants Act 1961 (13/61) (hereafter in this Order referred to as "the Act"), with respect to that infant may be made by summons in the proceeding, but except in that case any such application must be made by originating summons. B

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[18] Learned counsel for the defendant raised the preliminary objection that O. 84 r. 1 of the RHC is only applicable if there is any application under the Guardianship of Infants Act 1961 ("the GIA") or if the infant is made a ward of the court. But here, the plaintiff's application made no reference to the GIA and the illegitimate child is not a ward of the court since no wardship proceedings are filed or pending. She submitted that, therefore, the plaintiff's application is wrong and improper, and the court has no jurisdiction to entertain or make an order under O. 84 r. 1 of the RHC. D

[19] Going on technicality alone, I agree with the above preliminary objection, and allow it. It is correct to say that O. 84 r. 1 of the RHC cannot be invoked here at all since there is no pending action or proceeding by reason of which an infant is a ward of the court, or any application has been made under the GIA with respect to the infant. E

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[20] In this case, the plaintiff did not cite the GIA in the intitulement. In view of that, O. 84 r. 1 of the RHC is wrongly cited and relied upon by the plaintiff.

[21] During the hearing on 14 September 2011, learned counsel for the plaintiff conceded the GIA has not been cited by her in the intitulement of this OS and as such she would not rely on the GIA. However, she submitted that the GIA applies to illegitimate children as decided by the Federal Court case of *Sean O'Casey Patterson v. Chan Hoong Poh & Ors* [2011] 3 CLJ 722. G

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[22] Subsequent to the hearing, learned counsel for the plaintiff filed further written submissions stating that the GIA is of general application, and therefore it should be applied here, even though the GIA is not cited in the intitulement of the OS.

[23] I am of the opinion that since the GIA has not been cited in the intitulement of this OS at the time when encl. 1 of this OS was heard on 14 September 2011, the GIA cannot be relied upon by the plaintiff I

here. Thus, the provisions of the GIA, in particular, s. 5, which provides for the equality of parental rights over a child, cannot be invoked here.

[24] Learned counsel for the plaintiff then went on to rely on the inherent jurisdiction of the court in O. 92 r. 4 of the RHC. In my view, where there are specific provisions of law governing the matter, as in this case, then reliance should be made on those provisions and not on the inherent jurisdiction of the court.

[25] After the hearing on 14 September 2011, learned counsel for the plaintiff filed an application on 21 September 2011 to amend the title of the OS to include the GIA. That application has not been heard yet. In any case, that is already past the event of the hearing on 14 September 2011 and should not be considered here.

[26] Subsequently, on 22 September 2011 the plaintiff filed on *ex parte* notice of motion for leave to issue committal proceedings against the defendant for failing or refusing to grant the plaintiff access to the child in accordance with the interim order of the court giving access to the putative father to the child. Since the notice of motion was filed after the hearing of this OS on 14 September 2011, for the purposes of the court's decision on encl. 1 at this point, that notice of motion ought not to be considered here as well.

Whether This Court Has The Jurisdiction To Grant Access To A Putative Father To An Illegitimate Child

[27] Section 24(d) of the CJA provides as follows:

> 24. Without prejudice to the generality of section 23 the civil jurisdiction of the High Court shall include:
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> (a)
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> (b)
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> (c)
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> (d) jurisdiction to appoint and control guardians of infants and generally over the person and property of infants;

[28] Learned counsel for the defendant raised another preliminary objection that s. 24 of the CJA does not confer the court with the power to make any order for access to an illegitimate child since there is no mention of the word "access" in that section.

[29] With respect, in my opinion, the wording in s. 24(d) of the CJA is wide enough to grant the court the power to decide on access. The first part of s. 24(d) gives the court the "jurisdiction to appoint and

control guardians of infants". This would include the power to decide on guardianship of infants, whether legitimate or illegitimate. The second part of s. 24(d) gives the court the jurisdiction "generally over the person … of infants". This would include the power to decide general matters over the infant, whether legitimate or illegitimate, including access and other matters. The matters of custody and access are always interrelated. In the case of a legitimate child, whenever the court grants custody of a child to a parent, the court would usually have to decide whether to grant access to the other parent who has to been deprived of custody of the child.

[30] In the present case, at first instance, the plaintiff is not applying for custody of the illegitimate child. Instead, he is applying only for access to the child.

[31] Learned counsel for the defendant submitted that since the plaintiff is not applying for custody, he is not permitted at all to apply for access to the child.

[32] I am of the view that it is open to the plaintiff to decide whether to apply for custody and access together, or to apply only for access but not custody. However, I do not think that just because the plaintiff did not apply for custody, he is precluded from applying for access only. That is certainly not the intention of the legislature when s. 24(d) of the CJA was enacted.

[33] The next question is whether the plaintiff, as the putative father, has the right of access to the illegitimate child. This question cannot be completely answered by s. 24(d) of the CJA.

[34] The answer is found by reference to s. 27 of the CLA which provides as follows:

> Infants
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> 27. In all cases relating to the custody and control of infants the law to be administered shall be the same as would have been administered in like cases in England at the date of the coming into force of this Act, regard being had to the religion and customs of the parties concerned, unless other provision is or shall be made by written law.

[35] The words "custody and control of infants" in s. 27 of the CLA should be construed to include access to an infant.

[36] The position in our law under s. 24(d) of the CJA and s. 27 of the CLA regarding custody and access to illegitimate children is according to the English common law as at the date of coming into

force of the CLA ie, 7 April 1956 for Peninsular Malaysia and 1 April 1972 for Sabah and Sarawak. In the present case, the relevant date is 7 April 1956 since this is a case in Kuala Lumpur.

[37] It is trite under the English common law that the putative father has no legal rights over an illegitimate child. Only the natural mother has such legal rights over the illegitimate child.

[38] In *T v. O* [1992] 3 CLJ 1756; [1992] 3 CLJ (Rep) 633 Mahadev Shankar J (as he then was) at p. 637 stated:

> Under English common law, a father of an illegitimate child had no 'rights' over the child merely by virtue of his paternity. He had a legal obligation to support it, provided that it could be legally established that he was the father.

[39] In *Yap Lee See v. William Tay & Ors* [2011] 1 CLJ 793, I summarised the current law in Malaysia, following the English common law, on illegitimate children and concluded that the putative father has no rights over an illegitimate child. There, I also cited *Re Adoption Application No: 41/61* [1962] 2 All ER at p. 562 where Diplock LJ stated:

> ... It was clear policy … the court shall have no regard to the interest of the putative father of an illegitimate child.

[40] In *Yap Lee See (supra)* it was an application by the natural mother for custody of the illegitimate child. I granted custody to the plaintiff mother, and since she had also prayed for reasonable access to be granted to the putative father, I allowed that prayer but imposed the condition that access should be supervised in view of the high probability that the child might not be returned to the plaintiff after access by the putative father.

[41] In deciding the matter of guardianship and custody the court is guided by the following principles:

(a) whether the mother is considered morally unfit (see *Bromley's Family Law* (8th edn), para. 548 of *Halsbury's Laws of England*, vol. 24; *The Law of Guardianships* by Richard V Mackay – Oceana Publications Inc, New York, and also *Lim Suk Fang (F) v. Lim Kim Heng* [1993] 1 LNS 35, High Court, Kota Kinabalu, Syed Ahmad Idid J's decision in OS No. K 24-22-1993 dated 19 November 1993);

(b) the welfare and best interests of the illegitimate child (see *Chelsa Cabalona Abdullah v. Siek Ming Hua* [2008] 8 CLJ 285 at p. 294, and *Tang Kong Meng v. Zainon bt Md Zain & Anor* [1995] 4 CLJ 409); and

(c) the wishes of the natural mother:

In *T v. O (supra)* at p. 635, Mahadev Shankar J (as he then was) stated:

> The mother of an illegitimate child has *prima facie* the right of custody and when questions on custody arise the wishes of the mother are to be taken into account but the welfare of the infant is the first and paramount consideration ...

[42] In the present case, learned counsel for the defendant submitted that the court does not even have to consider the welfare and interests of the child since the plaintiff did not apply for custody of the child and therefore he cannot apply for access at all.

[43] I have already stated earlier in this judgment that the plaintiff can apply for access to the illegitimate child even if he did not apply for custody or guardianship of the child in the first place.

[44] The question that arises is, what would be the main factors that the court has to consider in deciding whether the putative father ought to be given access to the illegitimate child.

[45] Based on the English common law and decided cases in Malaysia, I am of the opinion that the two main considerations are:

(a) the wishes of the mother of the child; and

(b) the welfare and best interests of the child.

[46] In *George Pathmanathan Michael Gandhi Nathan v. Ong Eu May* [2011] 1 LNS 419, High Court Kuala Lumpur Originating Summons No. S8-24-53-2008, Suraya Othman J decided on 3 December 2009 to grant the application of the putative father ie, the plaintiff for access to his illegitimate son. The plaintiff was also ordered to pay a monthly maintenance of RM1,000 for his illegitimate son. There was no application for custody by the putative father though the intitulement of that OS cited s. 19A of the GIA and O. 84 of the RHC and the existing jurisdiction of the Honourable Court. The access terms given by the learned judge were very liberal and generous, almost like the terms that a legal father of a legitimate child would usually enjoy, should he be deprived of custody, care and control of the child after a divorce.

[47] Subsequently, *George Pathmanathan*'s case came before me on 23 March 2011 for the plaintiff father's application to vary the order dated 3 December 2009 (encl. 48) ie, to extend the current alternate weekend access by another day, and to have additional access ie, half of the final term school holidays of the child. I granted the extra access sought by the plaintiff father.

[48] When I decided *George Pathmanathan*'s case, as rightly pointed out by learned counsel for the defendant, it was not argued before me then the issue regarding the law, namely, whether under s. 24 of the CJA and s. 27 of the CLA, the court has jurisdiction to allow a putative father access to an illegitimate child. At that time, both parties proceeded on the basis that that legal question is not an issue since that matter would have been considered by the former learned judge when deciding encls. 1 and 8 (encl. 1 is the OS for guardianship and encl. 8 is the defendant mother's application to strike off encl. 1). My jurisdiction for encl. 48 at that point was to carry on from where the former learned judge had left, and I decided to grant the extra access to the plaintiff father, considering that he had already been enjoying liberal access to the child since 3 December 2009. Therefore, in determining that issue, I went on the legal principle of what is for the welfare and best interests of the child.

[49] Contrary to what was extensively submitted by learned counsel for the defendant in this case, I did not decide *George Pathmanathan*'s case based on "my firm belief" without reference to any law. I decided that case solidly based on the law that was cited in the intitulement, and I took the view that the court has jurisdiction to decide on that matter regarding access by a putative father to an illegitimate child, and after considering what is for the welfare and best interests of the child.

Whether Access Should Be Granted In This Case

[50] I now proceed to consider the facts, whether access should be granted to the putative father:

(a) The wishes of the mother of the child

[51] The defendant is resisting strongly this application for access. She does not wish to give any access at all to the plaintiff.

[52] Under the English common law, the natural mother has full legal rights to her child who is illegitimate. The putative father has no rights whatsoever to the illegitimate child. The defendant therefore has every right to deny the plaintiff access to the child.

[53] From the facts, it is clear that after the settlement agreement, after the last instalment of money was paid off by the plaintiff to the defendant on 1 January 2011, the defendant denied the plaintiff access to the child. The defendant asked the plaintiff to give her back her house keys and not come back to her house nor see the child anymore. The plaintiff averred that this was because after the last instalment was paid, sometime in late January 2011, the defendant demanded the plaintiff to continue to give her RM15,000 monthly but the plaintiff refused to do so.

[54] The defendant's contention is that the plaintiff never wanted the child in the first place. In fact, on several occasions, the plaintiff did attempt to induce the defendant to abort this child by giving her monetary compensation. But the defendant decided to keep and raise the illegitimate child without the involvement of the plaintiff.

[55] In para. 4 of her affidavit (2), the defendant stated that she has the financial capability to support the child and provide all the care and attention that the child requires.

[56] The defendant stated that all the monies paid to her by the plaintiff are compensation for sex with her. The defendant questioned the plaintiff's motive for making this application ie, whether he is using the child as a reason to continue and get closer to the defendant and maintain the defendant as his mistress, to secure his need for lust against the defendant.

[57] The plaintiff is certainly affronted by the defendant's allegations. He contended that he loves the child and wants to bond and spend time with the child. He denies that he had wanted the defendant to abort the child. According to the facts, prior to being denied access to the child by the defendant, the plaintiff had access to the child everyday, except for Sundays, until the payments in the settlement agreement were fully paid in January 2011. The plaintiff is indeed traumatised by the sudden denial of access to the child to the extent that he gatecrashed into the child's birthday party on 28 April 2011.

[58] The plaintiff has been paying a monthly maintenance of RM3,000 for the child since May 2010. He has also nominated the child to be 50% beneficiary of his EPF on 9 July 2010.

[59] However, what the plaintiff has been doing is of no importance to the defendant. She is more concerned over the fact that the plaintiff has a Chinese girlfriend and several other girlfriends; he drinks and smokes and is abusive, and he is not fit to be granted access because of his ungodly relationships.

[60] The defendant also fears for the child's security and welfare, and does not wish to have the child mingle with the plaintiff. The plaintiff wishes to sever all ties with the defendant. In her affidavit No. 1, the defendant posed several questions: If my daughter is injured and/or "sexually harassed" who shall take responsibility? If this illegitimate child is kidnapped by the plaintiff when he exercises access who shall bear the consequences? Who shall give surety and assurance that any such event will not occur. Should this Honourable Court be burdened and blamed for any untoward consequences towards his illegitimate child who could possibly be kidnapped or injured whilst the plaintiff is exercising his access rights?

[61] Based on the defendant's concerns, it is clear that if the court considers the mother's wish, the plaintiff should not be granted access to the child at all. The defendant has full legal rights to the child and the putative father has no legal rights or say on the matter. If the defendant wants a clean break from the plaintiff, and wishes to bring up the child on her own, that wish has to be respected, considering that the plaintiff had never thought it fit to marry the defendant, but merely kept her as his mistress.

[62] In determining the above issue of the mother's wish, the court also considers the larger issue of public policy.

[63] In *T v. O (supra)*, Mahadev Shankar J went on further to state:

> The very serious consequences which would follow by equating a natural father or mother to a lawful father or mother in the English legislation under consideration has been spelt out at great length and with great clarity by Roxburgh and need not be repeated here.

[64] What then is good public policy?

[65] The Law Reform (Marriage and Divorce) Act 1976 ("the LRA"), *inter alia*, provides for the custody, care and control of legitimate children of a marriage upon the divorce or judicial separation of their parents, and children deemed to be legitimate under the same Act eg, under s. 75 of the LRA upon a decree of nullity of a voidable marriage.

[66] Illegitimate children have always been treated not in the same manner as legitimate children.

[67] The guardianship and custody of illegitimate children have, in most cases, been dealt with under s. 24(d) of the CJA and s. 27 of the CLA. Until the recent Federal Court decision in *Sean O'Casey Patterson (supra)* given on 27 January 2011, the majority of the courts in this country have always decided that the GIA does not apply to illegitimate children. (See *Re Balasingam & Paravathy, Infants; Kannamah v. Palani* [1970]

1 LNS 134, *Khor Liang Keow lwn. Tee Ming Kook* [1996] 2 CLJ 631, *Low Pak Houng v. Tan Kok Keong* [1998] 1 CLJ Supp 357, *Sinnakaruppi Periakaruppan v. Bathumalai Krishnan* [2001] 2 CLJ 435, *Komalatah Gunasekaran lwn. Nagappan Ramasamy* [2006] 4 CLJ 563 and *Ruari Dharmuid Hann v. Tee Peggi* Shah Alam High Court OS No. MT3-24-2393-2006 (Unreported) (consolidated with OS No. MT4-24-1761-2006) dated 4 January 2008).

[68] In considering the numerous cases regarding the custody of illegitimate children, one has to be cautious in ascertaining, firstly, whether such application is made under s. 24(d) of the CJA and s. 27 of the CLA, or under the GIA, and secondly, the date of the decision by the court. It must also be noted that s. 5, as amended to provide for the equality of parental rights, of the GIA came into force on 1 October 1999. This is in view of *Sean O'Casey Patterson (supra)* where the Federal Court, in deciding certain questions of law put before it regarding the registration of adoption of an illegitimate child under the Registration of Adoptions Act 1952, made the finding that the GIA applies to illegitimate children.

[69] In *Sean O'Casey Patterson* James Foong FCJ considered s. 1(3)(a) of the GIA and several decided cases on whether the GIA applies to illegitimate children.

[70] Section 1(3)(a) of the GIA provides as follows:

> 1(3) Nothing in this Act shall apply in any State to persons professing the religion of Islam until this Act has been adopted by a law made by the Legislature of that State; and any such law may provide that:
>
> (a) nothing in this Act which is contrary to the religion of Islam or the custom of the Malays shall apply to any person under the age of eighteen years who professes the religion of Islam and whose father professes or professed at the date of his death that religion or, in the case of an illegitimate child, whose mother so professes or professes that religion;.

[71] Tan Sri James Foong FCJ then went on to make the following finding:

> As correctly observed in *Re Balasingam (supra)*, there is a "remarkable absence of any reference to illegitimate children other than in the above mentioned s. 1(2)(a) (now changed to s. 1(3)(a)". But then, one cannot ignore the fact that this word "illegitimate" appears in s. 1(3)(a) of GIA 1961. Undeniably, this word here is used for the purpose of excluding all mothers who professes or professed the Islamic faith from the benefits of the provisions of this Act. But why did Parliament single out an illegitimate child of a mother who professes or professed the Islamic religion? If Parliament had intended this Act to apply only to a legitimate child it could have kept silent on

A the issue of legitimacy in this section like the remaining part of the Act. There is no necessity to express this to cover an illegitimate child in s. 1(3)(a). By specifically highlighting this to say that "in the case of an illegitimate child "it must have intended, in our opinion, to be a reminder, not to exclude those who are illegitimate. Thus, this Act should apply to all children, legitimate as well as illegitimate.
B Otherwise, we see no reason, why an illegitimate child is singled for mention in s. 1(3)(a) GIA ...

... We conclude that the wordings of s. 1(3)(a) of the GIA is sufficient to imply that this Act applies to an illegitimate child.

C [38] Possessing such right and authority equivalent to that of the 1st defendant over J is one thing but whether the consent of the Plaintiff was required for the purpose of the registration is another ...

[72] Learned counsel for the defendant submitted the GIA does not apply to illegitimate children and the above statement of James Foong FCJ
D is *obiter dictum*. With respect, I do not agree that the above statement is *obiter dictum* but instead it is part of the *ratio decidendi* of the case since the Federal Court had to decide on whether the GIA applies to illegitimate children before it could consider the question put before it ie, "Questions 1 : Whether the appellant father's (plaintiff's) Consent
E Should Be Obtained To The Registration of Adoption of His Son Under The Registration Of Adoptions Act 1952".

[73] Even if it is conceded that the above statement by James Foong FCJ is *obiter dictum* (which I do not), I am of the firm opinion that the GIA
F is intended by Parliament to apply to illegitimate children. This is based on the Hansard recording of Parliament dated 3 August 1999 (submitted by learned counsel for the plaintiff) when the Timbalan Menteri Perpaduan Negara dan Pembangunan Masyarakat, in tabling the amendments to the GIA, including ss. 5, 19A and 19B, during the Second Reading of the amendment bill stated:

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at pp. 122, 123:

Turut diberi perhatian oleh Kerajaan dalam rang undang-undang ini ialah nasib budak-budak yang terbuang dan budak-budak yang tidak mempunyai ibu atau bapa atau penjaga. Melalui rang undang-undang
H ini kebajikan budak-budak tersebut akan terurus dengan sepatutnya.

Tuan Yang di-Pertua, pindaan yang utama yang dicadangkan melalui pindaan ini ialah kepada Seksyen 5 yang merupakan pindaan yang selama ini dinanti-nantikan oleh banyak pihak khususnya kaum ibu. Pemberian hak penjagaan yang sama kepada ibu sebagaimana yang
I diberikan kepada bapanya akan meredakan keresahan kaum ibu dan mengatasi banyak kesulitan yang terpaksa dihadapi oleh ibu yang menjaga penjagaan budak ...

Rang undang-undang yang dicadangkan ini turut mencadangkan kemasukan dua lagi peruntukan baru iaitu seksyen baru 19A dan 19B. Melalui Seksyen baru 19A ini, jika dua atau lebih daripada dua orang bertindak sebagai penjaga seseorang budak dan terdapat pertikaian antara mereka tentang apa-apa perkara yang menyentuh kebajikan budak itu, maka seorang daripada mereka boleh memohon kepada Mahkamah untuk mendapatkan arahan."; and

at p. 152:

Perkara yang kedua yang disentuh oleh Yang Berhormat Senator Dato' Lee Pit Chern mengenai hak penjagaan anak luar nikah, ibu atau wanita perlu jadi penjaga kepada anak luar nikah kerana ia hak semula jadi ibu yang melahirkannya. Bagi anak yang lahir di luar nikah, anak itu tidak mempunyai legal father. Anak itu mempunyai ibunya. Melalui rang undang-undang ini ibu tersebut menjadi penjaga anak yang lahir di luar nikah itu. Jika berlaku pertikaian tentang hak penjagaan anak itu maka perkara itu akan diputuskan oleh mahkamah. Tetapi sekiranya dia ibu tunggal tentu tidak ada bapa, kalau ada bapa mungkin tidak ada masalah. Jadi, tentulah ibu sebagai penjaga anak itu. Jadi, terpulanglah kepada ibu bagaimana mereka menjaga anaknya sendiri.

[74] In the earlier part of this judgment, I had already ruled that the GIA should not be considered here since it was not cited by the plaintiff in the intitulement of this OS. Even if the plaintiff is allowed to invoke the GIA here by relying on the inherent jurisdiction of the court, from the above Hansard, it is clear that the intention of Parliament is to protect all children, whether legitimate or illegitimate, so that a child will have a mother, father or guardian. The GIA gives an equal right to a mother to be given guardianship of a child. In a situation where the child has a natural mother, the mother should be the guardian of the child, and if any person disputes that right of guardianship, then the matter has to be decided by the court. With the introduction of s. 5 of the GIA, it does not mean that both parents must at all times be equally parenting the child. Whenever there is a dispute, the court can decide on which parent should be given custody, care and control of a child, including access matters.

[75] Therefore, going by strong public policy considerations, it would not be proper for this court to come up with a blanket ruling that a putative father must necessarily be given rights of access to an illegitimate child if the mother of such child wants a clean break from the putative father and wishes to bring up the illegitimate child on her own. That would set precedent and open the floodgates for all putative fathers to claim, as of right, access to illegitimate children.

[76] In *Yap Lee See*'s case *(supra)* I granted supervised access to the putative father only because the plaintiff mother herself had stated that as one of her prayers in her application. It must also be borne in mind here that this case was decided in 2010, before the Federal Court decision in *Sean O'Casey Patterson (supra)*.

[77] In *George Pathmanathan*'s case *(supra)* there was very little room for me to depart from the rationale of the earlier order dated 3 December 2009 since the former learned judge had already deemed it fit to grant very elaborate terms of access to the putative father. There was no question of me revisiting the original issue whether to grant access to a putative father. Accordingly, I had to grant the variation order for access for the welfare and best interests of that child.

[78] Here, I would like to stress that *George Pathmanathan*'s case *(supra)* must be distinguished from this case since the facts differ. In that case, the putative father/plaintiff was living with the defendant and the illegitimate child for about four years before the intimate relationship of both parties ended. The putative father had been physically helping the natural mother to nurture the child. Even after the separation of the putative father from the defendant, the putative father continued to have supervised access to the child. There was already close bonding between the putative father and the illegitimate child. Based on these facts, the former learned judge gave access to the putative father mainly because the court did not wish to disturb or destroy such bonding. The child, at the time of the hearing before the former learned judge, was about five years old and was able to appreciate his relationship with his putative father. According to the plaintiff, the child was very close to him then and "manja" with him. It would not be for the welfare or in the best interests of the child to be suddenly deprived of access to his putative father. That would be too traumatic.

[79] I am of the opinion that it should only be in exceptional circumstances that a putative father be given the privilege of access to an illegitimate child. Each case has to be decided on its own merits.

(b) Welfare and best interests of the child

[80] In *Karupayee Paramasua v. Ravisanthiran P Marimuthu* [2011] 1 LNS 650 Kuala Lumpur High Court Originating Summons No. F-24-12-2011, I decided to grant custody of the two illegitimate children to the putative father since there was sufficient evidence to prove that the natural mother is morally unfit and also unfit in other ways to be granted custody, care and control of the two children. I also considered the welfare of the children before making that decision.

[81] However, *Karupayee's* case is not on all fours with the present case since that is a case for custody by the natural mother as opposed to the present case where the putative father is applying, not for custody, but for access to the illegitimate child.

[82] As for the next question, whether it is for the welfare and best interests of the child that access should be granted to the putative father, I am of the opinion that it would not be for the welfare or best interests of the child for the following reasons:

[83] The child had no contact with the putative father from February 2011 until this OS was filed, after access was totally denied by the defendant. The defendant gatecrashed into the child's birthday party on 28 April 2011 but that does not amount to access. Even though I had granted interim access to the plaintiff on 5 August 2011 pending the hearing of this OS, learned counsel for the plaintiff informed me, during the hearing of the OS on 14 September 2011, that the plaintiff could not access the child either because the defendant denied him access or the child was asleep each time he wanted to access the child. Since the child has not seen the plaintiff on a daily basis from February 2011 onwards, I do not think that the child would be traumatised or in any way be adversely affected by the total denial of access at this point.

[84] Unlike the child who was about five years old at the time of the first application for access in *George Pathmanathan*'s case before the former learned judge, the child in this case had not been accessed regularly by the putative father from the time the child was only about 22 months old.

[85] In *George Pathmanathan*'s case I did cite Zainun Ali J's (as she then was) decision in *Leong Sam Moy v. Low Chee Thiam* [1997] 2 CLJ Supp 212 at p. 214 where she stated that "Access is the basic right of the child, rather than the parent". However, it must be noted that Zainun Ali J said that in relation to the custody, guardianship and access arrangements of three legitimate child whose parents were divorced earlier. That statement was not made in relation to an illegitimate child.

[86] Learned counsel for the plaintiff further relied on arts. 3 and 9 of the United Nations Convention of the Rights of the Child ("the CRC") which provide as follows:

> Article 3
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> 1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

A 2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

B 3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.;

C Article 9

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests
D of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

2. In any proceedings pursuant to paragraph 1 of the present article,
E all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to
F the child's best interests.

4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State
G Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse
H consequences for the person(s) concerned.

[87] The Government of Malaysia acceded to the CRC on 17 February 1995 but in a declaration dated 19 July 2010 it expressed its reservations with respect to certain articles (which did not include
I arts. 3 and 9) and declared that the said provisions shall be applicable only if they are in conformity with the Federal Constitution, national laws and national policies of the Government of Malaysia.

[88] The CRC applies to both legitimate and illegitimate children. A

[89] Both arts. 3 and 9 of the CRC state that the best interests of the child shall be the consideration for the matters provided therein. This is consistent with the welfare principle that I had earlier dealt with.

[90] Coming back to the present case, based on the facts, it is not for B the welfare or the best interests of the child to be accessed by the putative father on a regular basis considering the acrimonious relationship between the plaintiff and the defendant. The plaintiff has not made any offer to marry the defendant and to legitimise the child. Even though the plaintiff, on his own initiative, is paying RM3,000 per month for the C child and has made her a 50% beneficiary of his EPF money, it can never make up for the fact that it is through the plaintiff's affair with the defendant that this child is now rendered illegitimate. It is best that the defendant be allowed to move on with her life, with the child, without the plaintiff. There is no evidence at all that the defendant is D morally unfit, or unfit in other ways, to have sole custody, care and control of the child.

[91] There is therefore no justification for me to allow the liberal terms of access that the plaintiff seeks. There is also no good reason for the court to give an order to restrain the defendant, her servants or agents E from removing the child from the jurisdiction of the High Court of Malaya since under the English common law the putative father has no legal rights whatsoever over the illegitimate child.

[92] Based on the above considerations, I therefore dismissed the F application of the plaintiff with costs of RM5,000. Such costs are to be paid by the plaintiff to the defendant within 14 days from the date of this Order.

[93] The interim order on access dated 5 August 2011 is revoked. G

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